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In the Supreme Court of the United States

OCTOBER TERM, 1983

JAMES G. WATT, SECRETARY OF THE INTERIOR,
ET AL., PETITIONERS

v.

THE COMMUNITY FOR CREATIVE NON-VIOLENCE, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT*

REPLY MEMORANDUM FOR THE PETITIONERS

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1. Respondents, in their Brief in Opposition, appear to be briefing a different case than the one the government is asking to be reviewed. Respondents tell this Court that the case involves only "a factual difference so narrow as not to merit review" (Br. in Opp. 7); that the "only point in controversy is whether these demonstrators, while lawfully assuming the posture of sleep * * * may actually fall asleep" (*id.* at 8); and that "the only question before the Court * * * is whether the difference to the government between feigned and actual sleep by a group of demonstrators is sufficient to warrant this Court's plenary review" (*id.* at 16). "[A]gainst this factual background," respondents go on, "the court of appeals issued a one-sentence *per curiam* decision allowing the demonstration to proceed" (*id.* at 6). Respondents also state that "the only question decided below and presented here for review is whether the Park Service properly applied its 'no camping' regulations to

prohibit sleeping in the context of this demonstration" (*id.* at 8-9); and that the "court [of appeals] merely determined that the Park Service had improperly applied the regulations" (*id.* at 9).

As a description of the case actually before the Court, respondents' account seems to us to fall somewhat short of complete success. This is a case that the court of appeals regarded as so significant that it set it for en banc rehearing *sua sponte* and before panel decision. The "one-sentence *per curiam* decision" was issued because the judges divided 6-5 and could not agree on a majority opinion; in fact six separate opinions totaling some 85 pages were delivered. A reading of the lengthy opinions will reveal that none of the eleven judges below suggested that "the Park Service had improperly applied the regulations"; all of them agreed that the regulations do prohibit the sleep-in proposed by respondents as part of their demonstration.¹ All eleven judges conceived the issue to be whether the regulations as so applied infringed respondents' rights under the First Amendment to the Constitution of the United States. Five major opinions on this important issue of constitutional law were in fact delivered.

¹ Respondents' contention that the only question presented here is whether the regulations were properly applied is particularly ironic in light of the history of the regulations at issue. In 1981, the National Park Service also applied its regulations to deny respondents a permit to use Lafayette Park as an overnight sleeping area in connection with a similar demonstration. The court of appeals held, however, that the proposed sleeping activity, because it was intended to be expressive, was not barred by the then-existing regulations against camping. *Community for Creative Non-Violence v. Watt* ("CCNV I"), 670 F.2d 1213 (D.C. Cir. 1982). As respondents note (Br. in Opp. 2 n.1), the government did not seek review in this Court of this dubious holding that the National Park Service had misinterpreted its own regulations, but instead amended its regulations to make their intent clear beyond doubt. Accordingly, in this case involving the amended regulations the only issue is the constitutionality of enforcing concededly applicable regulations.

In the government's view, as in that of all eleven judges of the court of appeals, this is an important constitutional litigation, not the exercise in trivialities described by respondents. The case involves fundamental questions concerning the extent to which the First Amendment restricts the authority of the National Park Service to regulate the areas of Washington, D.C. that constitute, in many ways, the symbolic heart of the country: the National Memorial-core area parks. More particularly, the questions are whether conduct such as sleeping is "speech" entitled to special constitutional protection and, if so, what is the proper accommodation between that interest and the public interest in safeguarding other uses of this small unique area. The court of appeals' misguided analysis of these important and recurring issues clearly warrants review by this Court.²

2. This case has nothing to do with the "difference to the government" between "feigned" and "actual" sleep. The regulations whose constitutionality is at issue prohibit

²As the plurality below stated (Pet. App. 29a-30a), similar First Amendment questions are bound to recur frequently in the District of Columbia Circuit. Indeed, the decision below has already been relied on in a district court decision modifying regulations concerning demonstrations on the White House sidewalk that were promulgated to protect the safety of the President. The litigation over these regulations further illustrates the excessively detailed scrutiny to which the National Park Service's reasonable regulatory actions are subjected under the court of appeals' treatment of these First Amendment issues. For example, the safety regulations prohibited, *inter alia*, the use of hollow metal sign supports because of the danger that a bomb might be secreted inside. See generally 48 Fed. Reg. 28058-28063 (1983). The district court entered a preliminary injunction striking down this prohibition (among others) partly because it did not also apply to other items that included metal tubing, such as baby strollers. The court of appeals modified the order pending trial to permit the use of hollow metal tubing as a sign support only if it is permanently secured in a manner that prevents the insertion or ejection of an object from the tubing. See *White House Vigil for the ERA Committee v. Watt*, No. 83-1243 (D.D.C., July 19, 1983), slip op. 11-12, 19-20, modified, No. 83-1775 (D.C. Cir. Aug. 18, 1983), vacated on other grounds, No. 83-1243 (D.D.C. Sept. 2, 1983).

camping — defined as “the use of the parkland for living accommodation purposes such as sleeping * * *.” 36 C.F.R. 50.27(a). Sleeping overnight at a site is a central constituent of the activity of camping. The question is whether demonstrators who propose to sleep overnight in tents in Lafayette Park and the Mall for a period of several weeks have a constitutional right to do so, simply because they allege that their sleep is “expressive”—either in general (Judge Mikva) or because it communicates the substantive message of homelessness (Judge Edwards).

“Feigned sleep” has nothing to do with camping and thus is not forbidden in the regulations. Nor is jogging, chatting, or sunbathing. But the case is not about the difference between these activities, on the one hand, and “the use of the parkland for living accommodation purposes such as sleeping * * *” on the other. It is about whether the public interest in enforcing the prohibition against camping in Lafayette Park and the Mall is sufficiently substantial to outweigh the respondents’ First Amendment interest (if any) in using Lafayette Park and the Mall as sleeping quarters.

Respondents seek to “nickel and dime [the] regulation to death” (see Pet. App. 64a) by showing that many activities that do *not* constitute “camping” (e.g., feigning sleep or taking catnaps) are allowed. They also make much of the point that, under pressure from previous D.C. Circuit precedents — and, be it said, in order to be as sensitive as possible to First Amendment considerations — the regulations permit the erection of temporary structures and the maintenance of a 24-hour presence in connection with demonstrations. The government has, of course, never in any way conceded that these activities are *constitutionally* privileged; and it is our hope that this Court will, in deciding this case, make clear that the series of decisions by the court of appeals steadily eroding the power of the National Park

Service reasonably to regulate the conduct of demonstrations in the Memorial core parks have increasingly diverged from established First Amendment principles. But the actual issue for decision in this case is whether the Constitution permits the government to prohibit "the use of park land for living accommodation purposes such as sleeping * * *" — *i.e.*, camping — in the Memorial-core area. And that question, of course, turns not on whether it would cause serious harm to make a special exception for these specific respondents and allow them to sleep (as well as catnap or feign sleep), but whether serious harm would be caused by a general rule allowing all demonstrators who wish to engage in "expressive sleep" to camp in Lafayette Park and the Mall. See Pet. App. 63a-66a.

3. Respondents claim that the "no camping" regulations prevent them from demonstrating at all (Br. in Opp. 4 n.5). The assertion is absurd. Respondents can march, sing, speak, lie down, stand up, carry signs — all for 24 hours a day, in or out of their symbolic campsites. They have chosen not to do so, because they have been told they must go elsewhere to sleep. No doubt it would be a convenience to respondents if they were permitted to camp at the site where they are demonstrating. Perhaps they feel that sleeping in Lafayette Park and the Mall would enhance the force of their protest. But, as we explained in our petition (at 14-15), the Constitution does not guarantee the right to deliver a message in precisely the manner desired. See, *e.g.*, *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 647 (1981). The court of appeals' conclusion opens the door to countless other claims of First Amendment protection for conduct deemed to be expressive and thus seriously undermines the National Park Service's ability to regulate park uses. The potential problems created by this decision and the absurd result reached in the case itself — that the First Amendment guarantees respondents the right to use Lafayette Park and the Mall as sleeping quarters — warrants review by this Court.

For these reasons and the reasons stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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SEPTEMBER 1983